STATE OF MICHIGAN

COURT OF APPEALS

WILLIS AUXIER, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED January 27, 2009
v	No. 281793 Kent Circuit Court
NATIONWIDE PROPERTY & CASUALTY INS CO, Defendant-Appellant/Cross-Appellee.	LC No. 07-001536-NF

Before: Beckering, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

In this no-fault automobile insurance action, defendant Nationwide Property Casualty Insurance Company (Nationwide) appeals by leave granted the trial court's order granting plaintiff Willis Auxier's motion for partial summary disposition on the question of liability and denying Nationwide's cross-motion for summary disposition. Auxier cross-appeals the trial court's denial of his request for attorney fees under MCL 500.3148. We affirm.

I. Basic Facts And Procedural History

On February 16, 2006, Auxier allegedly sustained injuries when a vehicle rear-ended the 1992 Chevrolet Lumina van that Auxier was driving. There is no dispute that the Chevy van was titled solely in the name of Sandra Hamstra, Auxier's live-in girlfriend. At the time of the accident, Auxier owned a 1993 Buick Skylark, which Nationwide insured.

For purposes of this appeal, we consider the Chevy van to be uninsured. Hamstra's mother secured a policy of insurance for the Chevy van through Nationwide, even though the van was not titled in the mother's name. The policy provided coverage from November 28, 2005, through May 16, 2006. However, on December 27, 2005, Nationwide notified Hamstra's mother that it would cancel the policy effective January 26, 2006, for failure to provide spousal information. In the proceedings below, Auxier challenged the propriety and validity of the cancellation. But the trial court declined to address the issue, declaring the issue irrelevant in light of its decision that Auxier was not an owner of the Chevy van at the time of the accident. And Auxier does not challenge this ruling on appeal.

Auxier filed a claim for no-fault insurance benefits with Nationwide. And in March 2006, a claims adjuster for Nationwide contacted Auxier and took his recorded statement. The following exchange is part of Auxier's statement:

Nationwide: Please state the year, make and model of the vehicle that was involved in this accident.

Auxier: Okay, it was a 1991 [sic] Chevy Lumina Van.

Nationwide: And who was the owner of that vehicle?

Auxier: My girlfriend.

* * *

Nationwide: . . . And, who insures that vehicle?

Auxier: Nationwide.

Nationwide: Nationwide?

Auxier: That is one of the things that they are taking into consideration right now.

Nationwide: So you're saying there was possibly no coverage at the time of the accident?

Auxier: Right.

* * *

Nationwide: Okay. And what were you using her vehicle for?

Auxier: Just to take back some movies.

Nationwide: Okay. And how often to [sic] you have use of that vehicle?

Auxier: Any time that I want.

Nationwide: So you don't need to ask for her permission?

Auxier: No.

Nationwide: Okay. How often would you say you drive that vehicle?

Auxier: Um, maybe once a week.

Nationwide: Over how long a period? How long has she had the vehicle?

Auxier: Um, over . . . I guess a year as far as I know.

Auxier later confirmed the accuracy of the recorded statement during his March 2007 deposition.

On the basis of Auxier's statement, Nationwide denied Auxier's request for benefits because Auxier was an "owner" of the Chevy van and, therefore, he was disqualified from recovering benefits pursuant to MCL 500.3113(b), which precludes a person from recovering benefits when that person is the owner of an uninsured vehicle involved in the accident.

In February 2007, Auxier commenced this first-party no-fault action in circuit court. Auxier then moved for summary disposition under MCR 2.116(C)(10), on the ground that, as a matter of law, he was entitled to no-fault benefits because, under the undisputed facts of this case, he could not be deemed an "owner" of Hamstra's Chevy van, as MCL 500.3101(2)(h)(*i*) defines the term "owner"[1] According to Auxier, because he was not an owner of the Chevy van, MCL 500.3113(b) did not disqualify him from recovering benefits. Auxier also argued that he was entitled to attorney fees under MCL 500.3148 because Nationwide's denial of benefits was unreasonable and without any factual basis.

Nationwide filed a cross-motion for summary disposition, arguing that, as a matter of law, Auxier was an owner of the Chevy van at the time of the accident, as he not only had extensive use of the vehicle, but also that he had a right to use the vehicle "any time that I want." And, according to Nationwide, because Auxier was an owner of the Chevy van, and the Chevy van was uninsured, MCL 500.3113(b) disqualified him from recovering benefits. Nationwide also argued that Auxier was not entitled to attorney fees under MCL 500.3148 because Nationwide's denial of benefits was not unreasonable when it was based on a legitimate question of statutory construction regarding the term "owner."

After hearing oral arguments on the motions, the trial court issued its opinion and order, granting Auxier's motion for partial summary disposition and denying Nationwide's cross-motion for summary disposition. The trial court found that "the evidence [was] insufficient to find that [Auxier] had a regular pattern of unsupervised usage so as to establish a proprietary or possessory interest in the vehicle or that he had a right to use the vehicle for more than 30 days thus coming within the definition of 'owner' contained in the no-fault act." Further, because Auxier was not an owner of the uninsured Chevy van, the trial court ruled that the statute did not bar him from receiving no-fault benefits. The trial court also concluded that, because this case dealt with a legitimate question of statutory construction, there could be no award of attorney fees.

Nationwide now appeals, and Auxier cross-appeals.

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[1] We note that the Legislature recently amended MCL 500.3101, effective July 17, 2008, redesignating the previous subsection (2)(g) to (2)(h). 2008 PA 241. However, the substance of the subsection remains unchanged.

II. Interpreting "Owner" Under The No-Fault Insurance Act

A. Standard Of Review

Nationwide argues on appeal that the trial court erroneously granted summary disposition in favor of Auxier and denied Nationwide's motion for summary disposition in light of Auxier's extensive use of the Chevy van, coupled with the fact that he had the right to use the van anytime that he wanted, which demonstrated that he was an "owner" of the vehicle.

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the ground that there is no genuine issue with respect to any material fact and the moving party is, therefore, entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support its position with documentary evidence.[2] The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.[3] We review de novo the trial court's ruling on a motion for summary disposition.[4] We also review de novo the proper interpretation of a statute.[5]

B. Auxier's Use Of The Chevy Van

The statute requires the owner or registrant of a motor vehicle to maintain insurance on that vehicle.[6] The statute disqualifies an owner who fails to maintain insurance from obtaining PIP benefits.[7] The no-fault insurance act defines the term "owner" as:

> (i) A person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days.
>
> (ii) A person who holds the legal title to a vehicle, other than a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days.
>
> (iii) A person who has the immediate right of possession of a motor vehicle under an installment sale contract.[8]

Here, there is no dispute that Auxier was not purchasing the vehicle under an installment sale contract. Therefore, subsection (iii) does not apply. Further, there is no dispute that Auxier

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[2] MCR 2.116(G)(3)(b); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[3] MCR 2.116(G)(4); *Maiden*, *supra* at 120.

[4] *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 48; 742 NW2d 622 (2007).

[5] *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997).

[6] MCL 500.3101(1).

[7] MCL 500.3113(b).

[8] MCL 500.3101(2)(h).

did not hold legal title to the Chevy van; Hamstra was the title owner. Therefore, subsection (ii) does not apply. Accordingly, we must determine if, as subsection (i) requires, Auxier's use of the Chevy van for a period greater than 30 days classified him as an "owner" of the vehicle.

There may be more than one "owner" of a vehicle for purposes of the no-fault insurance act.[9] Therefore, the fact that Hamstra was the title owner of the Chevy van does not preclude a finding that Auxier was also an "owner" of the van.

Where, as here, there is no rental agreement, for purposes of defining "owner," "having the use" of a motor vehicle means using the vehicle in ways that comport with concepts of ownership.[10] The focus must be on the nature of the person's right to use the vehicle.[11] "[O]wnership follows from *proprietary* or *possessory* usage, as opposed to merely incidental usage under the direction or with the permission of another."[12] It is a "regular pattern of unsupervised usage" rather than "spotty and exceptional" usage that will support a finding of ownership.[13] Moreover, the person need not actually have used the vehicle for more than 30 days before the accident to be considered an owner under the statute.[14] Rather, the statute requires only that the person have had the right to use the vehicle for the requisite period.[15]

Here, it is undisputed that Nationwide denied Auxier's claim based solely on his March 2006 recorded statement. In that statement, Auxier stated that for approximately the year before the accident he had access to use of the Chevy Van any time that he wanted without having to ask Hamstra's permission. However, as the trial court pointed out, Auxier's and Hamstra's deposition testimony "provided significant clarification of those statements."

According to Auxier and Hamstra, Auxier first began driving the van in June 2005, and he drove it one to two times a month for the first six to eight months. After that time, Auxier used the Chevy van approximately once a week. According to Hamstra, Auxier began using the Chevy van more frequently after his Buick "broke down." Auxier generally used the Chevy van to go to the store, to run errands for the family, to go to work, or to go to the movies. Hamstra stated that Auxier usually used the Chevy van because his vehicle was out of or low on gas.

Hamstra generally supplied gasoline for the Chevy van, but Auxier would pay for the gas he used. Hamstra and Auxier both testified that he changed the oil and replaced the brake pads

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[9] *Chop v Zielinski*, 244 Mich App 677, 681; 624 NW2d 539 (2001); *Ardt v Titan Ins Co*, 233 Mich App 685, 690; 593 NW2d 215 (1999); *Integral Ins Co v Maersk Container Service Co*, 206 Mich App 325, 332; 520 NW2d 656 (1994).

[10] *Ardt*, *supra* at 690.

[11] *Twichel v MIC Gen Ins Co*, 469 Mich 524, 530; 676 NW2d 616 (2004).

[12] *Ardt*, *supra* at 691 (emphasis in original).

[13] *Id*.

[14] *Twichel*, *supra* at 530-532.

[15] *Id*. at 530-531.

on the Chevy van several times. Hamstra also had a friend change the brake pads on one occasion. Hamstra paid for the oil and the brake pads. Auxier also testified that he changed a fuse and a flat tire on the van and that he performed minor repairs on the van related to the accident.

Hamstra testified that she used the van to go to the store, to go grocery shopping, to go see friends, and to take her children to and from school. Hamstra testified that the Chevy van had child seats in it for her children. According to Hamstra, she also used the Chevy van to get to and from work. Hamstra explained that Auxier would either drive his own vehicle to work or she would take him to work in her Chevy van. Hamstra would then pick up Auxier after work, or he would get a ride home.

Although Auxier testified that he did not need to ask permission to borrow the van, according to Hamstra, Auxier actually asked her permission "most of the time" before using the Chevy van. In fact, on the day of the accident, Auxier specifically asked permission to use the van to return movies because his Buick was low on gas. Hamstra also stated that there were three or four occasions when she denied Auxier use of the Chevy van because she needed to use it. Further, Auxier did not have his own set of keys to the Chevy van. Rather, Auxier would take a spare set of keys that Hamstra kept hanging from a hook in the kitchen when he needed to use the van. And although he indicated in his recorded statement that he used the Chevy van whenever he wanted, in his deposition, Auxier indicated that his use of the Chevy van was limited to "certain circumstances."

Auxier's and Hamstra's testimony clearly demonstrates that Auxier had use of the Chevy van for more than 30 days. Further, Hamstra indicated during her deposition testimony that there were times when Auxier had used her Chevy van without first obtaining her express permission. However, their testimony also established that Auxier's use of the vehicle was permissive, rather than possessory.[16] Auxier did not have his own set of keys, and Hamstra denied him use of the vehicle on several occasions. And while Auxier performed certain maintenance on the vehicle, Hamstra paid for it. Moreover, Auxier had his own vehicle, and his use of the Chevy van was largely "merely incidental" to his failure to keep sufficient gasoline in his vehicle.[17] Auxier's use of the Chevy van did not rise to the regular or exclusive usage seen in other cases where this Court has deemed a party a vehicle's "owner" under MCL 500.3101(2)(h)(*i*).[18]

Accordingly, we conclude that the trial court did not err in ruling that Auxier was not an "owner" of the uninsured Chevy van as MCL 500.3101(2)(h)(*i*) defines that term. And because he was not an owner of the uninsured vehicle, the trial court properly found that MCL 500.3113(b) did not preclude Auxier from recovering no-fault benefits. Therefore, it was error for Nationwide to disqualify Auxier from no-fault benefits.

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[16] See *Ardt*, *supra* at 691.

[17] See *id*.

[18] See *Twichel*, *supra* at 531; *Roberts v Titan Ins Co*, ___ Mich App ___; ___ NW2d ___, issued December 4, 2008 (Docket No. 280776), slip op at p 9; *Chop*, *supra* at 681 n 1; *Kessel v Rahn*, 244 Mich App 353, 357; 624 NW2d 220 (2001).

III. Attorney Fees

A. Standard Of Review

Auxier argues on cross-appeal that he was entitled to attorney fees under MCL 500.3148 because Nationwide's denial of benefits was unreasonable and without any factual basis. As stated, we review de novo the proper interpretation of a statute.[19] "We will not disturb a trial court's findings concerning a plaintiff's claim for attorney fees pursuant to MCL 500.3148 unless the finding is clearly erroneous."[20]

B. The Reasonableness Of Nationwide's Refusal To Pay Auxier's Claim

MCL 500.3148 provides the statutory basis for an award of attorney fees under the no-fault insurance act. Specifically, the act provides:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, *if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment*.[21]

The refusal of an insurer to make no-fault payments creates a rebuttable presumption that the refusal was unreasonable.[22] "The insurer has the burden of rebutting this presumption of unreasonableness by justifying the refusal or delay."[23] A delay is not unreasonable if the insurer bases it on a "legitimate question of statutory construction, constitutional law, or factual uncertainty."[24] We determine reasonableness on the basis of facts known to the insurer at the time of the denial.[25]

Despite our conclusion that Nationwide mistakenly disqualified Auxier from no-fault benefits, like the trial court, we conclude that Nationwide's decision was reasonable. Nationwide was entitled to rely on Auxier's own recorded statement in which he indicated that he did not need Hamstra's permission to use the Chevy van and that he could use the vehicle anytime that he wanted. Although facts eventually came to light that evidenced Auxier's merely permissive use of the vehicle, Nationwide's determination was reasonable on the basis of the

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[19] *Putkamer, supra* at 631.

[20] *Ivezaj v Auto Club Ins Ass'n*, 275 Mich App 349, 352-353; 737 NW2d 807 (2007).

[21] MCL 500.3148(1) (emphasis added).

[22] *Attard v Citizens Ins Co of America*, 237 Mich App 311, 317; 602 NW2d 633 (1999).

[23] *Ivezaj*, *supra* at 353.

[24] *Ivezaj*, *supra* at 353; *Attard*, *supra* at 317; *McCarthy v Auto Club Ins Ass'n*, 208 Mich App 97, 103; 527 NW2d 524 (1994).

[25] *Ivezaj*, *supra* at 353-355; *McCarthy*, *supra* at 105.

facts it knew at the time of the denial. Accordingly, the trial court properly concluded that Auxier was not entitled to recover an award of attorney fees against Nationwide pursuant to MCL 500.3148.

Affirmed.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly